1958

D. L. Atherley v. Bullion Monarch Uranium Company, Inc. : Brief of Respondent

Utah Supreme Court

Van Cott, Bagley, Cornwall & McCarthy; Clifford L. Ashton; Donald E. Schwinn; Attorneys for Defendant and Respondent;

In the

Supreme Court of the State of Utah

D. L. ATHERLEY,
Plaintiff and Appellant,

vs.

BULLION MONARCH URANIUM COMPANY, INC., a Utah corporation,
Defendant and Respondent.

Case No. 8859

BRIEF OF RESPONDENT

VAN COTT, BAGLEY,
CORNWALL & McCARTHY,
CLIFFORD L. ASHTON,
DONALD E. SCHWINN,
Attorneys for
Defendant and Respondent.

ARROW PRESS, SALT LAKE

TABLE OF CONTENTS

STATUTES CITED

CASES CITED

TEXTS CITED

In the
Supreme Court of the State of Utah

D. L. ATHERLEY,
Plaintiff and Appellant,

vs.

BULLION MONARCH URANIUM COMPANY, INC., a Utah corporation,
Defendant and Respondent.

Case No. 8859

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

This is an action by plaintiff-appellant to quiet title to an unpatented mining claim known as the Poison Fraction. Defendant-respondent in its answer asserted that such claim was without any legal or equitable foundation and sought by counterclaim to quiet its title to four unpatented lode mining claims which, it asserted, covered all of the area purportedly claimed under the Poison Frac-

tion location. Subsequently, defendant-respondent moved for summary judgment quieting its title as against the plaintiff-appellant in and to one of such claims, the Farmer John No. 3, Mineral Survey 7292, Utah, on which is located virtually all of respondent's developed mine. By Memorandum Decision of January 27, 1958, and Judgment of February 17, 1958, the court below granted said motion for summary judgment.

The parties will be hereinafter referred to as appellant and respondent.

STATEMENT OF FACTS

Respondent's motion for summary judgment conceded, for the purposes of the motion, that all of the material contentions made by appellant were correct. There is therefore no issue between the parties on this appeal as to any material fact. The statement of facts contained in appellant's brief, however, is not complete enough to afford the Court a full understanding of the questions presented and contains lengthy arguments and assertions relating to facts already admitted which serve only to confuse the issues. Respondent therefore deems it necessary to restate the facts. Before doing so, however, respondent desires to call the Court's attention to one material misstatement of fact by appellant. On page 4 of his brief appellant states that the purported movement of the south line of the Farmer John No. 3, which was conceded by respondent for the purposes of the motion for summary judgment, was made "since 1952." This is no doubt an inadvertence since appellant

states on page 3 of his brief that such movement took place between 1943 and 1952. In any event, the record is clear that the corners of the claim have remained in their present position at least since 1952, three years prior to appellant's first attempt to locate a mining claim in the area (Tr. 11, 50).

All of the facts material to the motion for summary judgment and this appeal appear in the pleadings and in appellant's deposition of June 17, 1957, published on October 18, 1957, in the hearing on respondent's motion. References to transcript page refer to said deposition.

The Farmer John No. 3 claim was located in 1943 by one James M. Sargent who subsequently conveyed his interest therein to Bullion Monarch Uranium Company, Inc., the respondent in this case (Tr. 7, 39-40). The mining of uranium from said claim was the first uranium mining conducted in the State of Utah (Tr. 36).

Appellant D. L. Atherley first came on the property covered by the Farmer John No. 3 in 1949, six years after the location of said claim under the mining laws of the United States and the State of Utah (Tr. 3, 35). Appellant worked said claim himself, under contract with respondent Bullion Monarch Uranium Company, Inc., from 1949 to 1952 and removed during said period of time some ten thousand tons of ore from the area now in dispute (Tr. 6-7).

The Farmer John No. 3 claim was leased in 1954 to Vanadium Corporation of America, which company has since worked and developed the mine (Tr. 28-29).

Appellant D. L. Atherley estimates that Three Hundred Thousand Dollars ($300,000.00) has been expended by respondent and its lessees and contractors in developing the area in dispute (Tr. 44).

This litigation arose out of a mining claim named the Poison Fraction located by the appellant. Said claim was first located in May of 1955 over a small portion of the eastern part of the Farmer John No. 3 (Tr. 14, 17-21). In 1956, appellant amended the location of the Poison Fraction so that it covered the area presently in dispute as shown on respondent's Exhibit "A" to appellant's deposition. Respondent's lessee, Vanadium Corporation of America, was conducting mining operations on the area in dispute at the time of the location and the amendment of the Poison Fraction by appellant and had been conducting such operations for some time previously thereto (Tr. 29).

The following facts, all admitted by appellant in his deposition, are the basis for the motion for summary judgment herein:

1. Appellant does not contend that respondent or its predecessors in interest have ever failed to do the annual assessment work required by the mining laws of the United States and the State of Utah (Tr. 35).

2. Appellant acknowledges that the corners of the Farmer John No. 3 claim were, at the time of his location of the Poison Fraction, in the same position that they had been in since 1952, three years before he first attempted to locate the Poison Fraction, that such corners (brass cap U. S. Mineral Survey monuments, Tr. 11) are still in the

same place that they were in in 1952, that he, the appellant, knew where said corners were at the time he located and amended the Poison Fraction, and that he deliberately staked over said corners (Tr. 11, 50).

3. The Farmer John No. 3 claim, as now staked and as it has been staked since 1952, under the admitted facts, included within its limits all the area presently in dispute (Tr. 49-50).

4. At the time of the location and amendment of the Poison Fraction by appellant, respondent through its lessee was in possession of the area in dispute and was conducting mining operations thereon and had been conducting mining operations thereon for some time previously (Tr. 29).

5. The area which appellant claims in this case covers substantially all of the developed mine on the Farmer John No. 3 claim (Tr. 47-48).

Appellant contends that the Farmer John No. 3 claim was located in 1943 in the north 55° east direction shown on respondent's Exhibit "A" to appellant's deposition. He further contends that, some time *prior to 1952,* the claim was amended or a new location was made so that the boundaries thereof coincided with the east-west claim as shown on said Exhibit and as claimed by respondent. There is no dispute as to the fact that the boundaries as shown by the east-west claim were established by the Ogden and Shelton Surveys and that said boundaries have been clearly marked on the ground since 1952 and that said boundaries have represented the claim of respondent since 1952.

Appellant further contends that, since the claim was originally located as indicated on said Exhibit and since no amended or relocation notice has even been placed of record in the County Recorder's Office of Piute County, respondent cannot now claim and has not legally located that portion of the ground lying south and east of the location as originally made. Under this theory, appellant in 1955 and 1956 located the Poison Fraction claim as shown on respondent's Exhibit "A" to appellant's deposition. Appellant contends that the area colored in red on the Exhibit was at the time of the location of the Poison Fraction, open public domain. This appeal involves the rights in said colored portion.

For the purposes of the motion for summary judgment, and hence on this appeal, respondent is willing to concede that appellant's contentions are correct. That is, respondent concedes for the purpose of the motion and appeal that the Farmer John No. 3 claim was originally located in a northeast-southwest direction as shown on Exhibit "A" and that, some time prior to 1952, the claim was amended or a new location was made in accordance with the claim as presently contended for by respondent and that no amended or relocation notice was placed of record at the time of said purported movement. Assuming said facts to be correct, respondent contended below and contends here that appellant cannot recover as a matter of law.

Briefly stated, the only issue on this appeal is whether or not a mining locator, with full knowedge of the claim of a prior claimant, may deliberately stake over the boundaries of said prior claimant while the latter is in possession

and mining the property claimed, and assert the invalidity of the prior claim on the sole ground that, many years before, the prior claimant had amended or relocated his claim without filing of record an amended or relocation certificate.

STATEMENT OF POINTS RELIED ON

POINT I.

THE LOCATION OF THE CORRECT AND VALID SOUTH LINE OF THE FARMER JOHN NO. 3 IS NOT A DISPUTED QUESTION OF FACT.

POINT II.

CONCEDING ALL OF THE MATERIAL FACTS CONTENDED FOR BY APPELLANT, APPELLANT CANNOT RECOVER AS A MATTER OF LAW FOR THE FOLLOWING REASONS:

(A) Respondent Has, With Respect to the Area in Conflict, Performed Every Act Necessary to Initiate and Maintain a Right Under the Mining Laws as Against Appellant.

(B) Appellant Had No Standing in 1955 or 1956 to Initiate a Valid Mining Claim on the Area in Conflict.

(C) Respondent Has Established a Valid Title to the Farmer John No. 3 Claim as Against Appellant by Reason of the Fact That it and its Predecessors in Interest Have Held and

Worked Said Claim for a Period in Excess of Seven Years.

ARGUMENT

POINT I.

THE LOCATION OF THE CORRECT AND VALID SOUTH LINE OF THE FARMER JOHN NO. 3 IS NOT A DISPUTED QUESTION OF FACT.

Point I of appellant's brief is entitled "The Location of the Correct and Valid South Line of the Farmer John No. 3 is a Disputed Question of Fact." A reading of appellant's argument under this heading demonstrates clearly that there is no disputed question of fact. After stating that such an issue exists in his heading, appellant does not again refer to the matter but argues instead the *legal* effect of the facts as admitted. At no point does he refer to any fact concerning which there is a difference between the parties. Respondent therefore, except for this brief statement, will likewise devote its argument to the legal issues presented. The cases cited by appellant under Point I of its brief, which cases deal with the legal issues, will be discussed in Point II (A) hereinafter.

POINT II.

CONCEDING ALL OF THE MATERIAL FACTS CONTENDED FOR BY APPELLANT, APPEL-

LANT CANNOT RECOVER AS A MATTER OF LAW FOR THE FOLLOWING REASONS:

(A) Respondent Has, With Respect to the Area in Conflict, Performed Every Act Necessary to Initiate and Maintain a Right Under the Mining Laws as Against Appellant.

The grant of mineral lands on the public domain to citizens of the United States is contained in and controlled by the provisions of the Act of May 10, 1872, 30 U. S. C. A. 22, *et seq.* Said law provides the means by which title to federal lands are acquired and further provides that locations made there under shall be made in accordance with the local rules or customs of mining districts in which the claim is located insofar as the same are applicable and not inconsistent with the laws of the United States. It has frequently been held that states also may make such rules and regulations by statute. There are no local customs or mining rules or regulations in force with respect to the ground covered by the claim involved in this lawsuit. The laws of the State of Utah respecting location will be considered hereinafter.

The only requirements imposed by the federal law upon the locator of a mining claim on the public domain are as follows:

1. There must be a discovery of mineral within the limits of the claim.

2. The location or claim must be distinctly marked on the ground so that its boundaries can be readily traced.

There is no requirement of posting or recording a location notice or certificate.

The Utah law relating to the location of mining claims on the public domain provides no additional requirements insofar as the location itself, as distinguished from the record of the claim, is concerned. Sections 40-1-1 to 40-1-13, *Utah Code Annotated,* 1953. Said law does provide, however, that, within thirty days after the location of a claim, a copy of the location notice should be filed of record in the office of the County Recorder of the county in which the claim is located. There is no provision relating to amended location notices or providing for the recording thereof.

Let us now consider the requirements of the law in relation to acts of respondent Bullion Monarch Uranium Company, Inc., with respect to the area in dispute.

The first requirement, which has frequently been referred to by the courts as "the source of the miner's title," is that of discovery. There is no contention in the instant case that respondent has failed to make a discovery on the disputed area. In fact, appellant himself, working the area on a contract with respondent, removed ten thousand tons of uranium ore therefrom between 1949 and 1952, more than three years prior to his first attempt to locate a claim over the area. Moreover, Vanadium Corporation of America was mining ore from the claim at the very moment that appellant located his claim thereon (Tr. 29).

The second requirement is that of marking the claim so that its boundaries can be readily traced. There is no

contention that this was not done in the present case. Appellant admits that the corners of the claims were placed in their present positions, so as to cover all of the disputed area, at least by 1952 and that they have remained in position since that time. He further admits that he was working the very area that is now in dispute on a contract with respondent from 1949 to 1952 and that he knew respondent claimed said area throughout the entire period in question.

Basically, the only proposition relied on by appellant to sustain his attempt to divest respondent of its very valuable mining property is that the conflict area was open public domain for the sole reason that respondent failed to file with the County Recorder a location notice as provided for by Utah law or an amended location notice. Respondent submits that the failure to record such a notice is immaterial in this case for two reasons:

1. The recording of a notice of location is not requisite to the initiation of title under the mining laws, and the failure to record such a notice does not forfeit a title properly initiated.

2. Appellant had *actual* notice of the claim of respondent and hence cannot complaint of the absence of *constructive* notice.

For the purpose of this discussion it is important to distinguish the *location* of a mining claim from the *record* of such claim. The locator's title to a mining claim under the mining laws is initiated by the discovery of mineral coupled with the segregation of the claim from the public domain by the marking of the boundaries thereof. As was

said in *Clark-Montana R. Co.* v. *Butte & Superior Copper Co.*, 233 Fed. 547, affirmed 249 U. S. 12:

> "A location and its record are different things. The federal and state statutes distinguish between them, and the former even in authorizing local rules 'governing the location' and 'manner of recording.' [30 U. S. C. 28.] The statutory object is to protect and reward discoverers of mines. *Discovery with intent to claim is the principal thing and vests an estate—an immediate fixed right of present and exclusive enjoyment in the discoverers.* The record is incidental machinery to secure to the discoverer his reward and to give notice to others. The spirit of all recordation acts is notice to protect others against secret equities. If the record is not necessary to create the estate (as it is in the matter of homestead exemptions and mechanic's liens), the statute providing for recording is but a direction to do certain acts *and does not create conditions subsequent;* and if the statute provides no forfeiture for failure to record, by failure the estate is not divested. *Recordation of mining locations cannot be a condition precedent, for the estate arises before recordation is to be performed.*" (Emphasis supplied.)

The title to a mining claim is therefore initiated by discovery and segregation. An estate immediately vests thereon. In the absence of a provision for forfeiture in recordation statutes, such statutes do not create conditions subsequent to the estate. The Utah law does not provide for forfeiture for failure to record. Respondent therefore submits that the title initiated by discovery and segregation of the disputed area continued and was in full force and effect when appellant attempted to locate a mining claim thereon.

Other cases holding that the right to a mining claim will not be forfeited by a failure to record a notice of location, in the absence of a state statute expressly providing for a forfeiture on that ground, are *Jupiter Mining Co.* v. *Bodie Consolidated Mining Co.*, 11 Fed. 666; *Dripps* v. *Allison's Mines Co.*, 187 Pac. 448; *Indiana Nevada Mining Co.* v. *Gold Hills Min. & Mill. Co.*, 126 Pac. 965; *Johnson* v. *Ryan*, 86 P. 2d 1040.

Forfeitures are odious and are not to be implied.

Even if we assume however, contrary to the law as stated, that recorded notice is requisite to the continuing validity of a mining claim, appellant herein admits that he was fully aware of the location claimed by respondent and that respondent was in possession of the claim at the very moment when he attempted to initiate rights thereon. Therefore, the requirement of notice was fulfilled, and appellant is in no position to complain of the failure to record. As was stated in *Flynn* v. *Vevelstad*, 119 F. Supp. 93, affirmed 230 F. 2d 695:

> "The answer alleges, but only by way of recital, that the plaintiff had actual notice of the defendant's claims. *Proof of this would have been the equivalent of valid record notice.* [Citing numerous cases.]" (Emphasis supplied.)

In the Supreme Court's decision in the *Butte & Superior Company* case, *supra*, the court commented on a previous case that considered a similar question as follows:

> "*Yosemite Mining Co.* v. *Emerson* was concerned with a regulation of the State of California which prescribed the manner of the location of a

> claim. The regulation had not been conformed to and the validity of the location was attacked on that ground by a subsequent locator who had had notice of the claim, he contending that there was forfeiture of it. The contention was rejected and we said, that to yield to it would work great injustice and subvert the very purpose for which the posting of notices was required, which was, we further said, 'to make known the purpose of the discoverer to claim title to the' claim 'to the extent described and to warn others of the prior appropriation.' The comment is obviously applicable to the asserted defects in the declaratory statement of appellees. It, like the California requirement, had no other purpose than 'to warn others of the prior appropriation' of the claim, and such is the principle of constructive notice. *It —constructive notice—is the law's substitute for actual notice, and to say that it and actual notice are equivalents would seem to carry the self-evidence of an axiom. Besides, in this case there was unequivocal possession of the Elm Orlu and it is elementary that such possession is notice to all the world of the possessor's rights thereunder. Simons Creek Coal Co.* v. *Doran,* 142 U. S. 417." (Emphasis supplied.)

In summary, respondent submits that, with respect to the conflict area, it has performed every act required to initiate and maintain a valid mining claim as against the appellant. Appellant's own statements show that respondent has discovered valuable mineral on such area, that it has claimed the same and has segregated the same from the public domain since 1952, three years prior to the time when appellant attempted to initiate a mining claim thereon, and that it has performed the annual assessment work thereon for every year since the claim was located. The

only deficiency which is admitted by respondent or claimed by appellant is the failure to record an amended or relocation notice. Respondent submits that failure to record such a notice does not work a forfeiture of its rights under the mining claim and further that appellant by his own admissions had full knowledge of the extent and limits of the claim of respondent and cannot therefore complain of the absence of constructive notice thereof.

None of the authorities cited by appellant under Point I of his brief are in conflict with the propositions set forth herein. Indeed, most, if not all, of the cases support respondent's position. For the convenience of the Court, respondent will briefly summarize said cases in the order in which they appear in appellant's brief.

The case of *Shoshone Min. Co.* v. *Rutter,* 87 Fed. 801, 177 U. S. 505, is a case similar to the instant case but does not stand for the proposition claimed by appellant. In the case, the prior locator, before the attachment of any rights of the subsequent locator, initiated a new claim by a different name on top of his old location, including land not previously covered thereby. Because of the fact that the second claim had a different name and was regarded by the first locator as a separate location, the subsequent locator contended that the second location was invalid in the absence of a showing that the prior location had been abandoned. It is noted that there is some apparent merit to this contention and that the subsequent locator's position in said case is considerably stronger than appellant's posi-

tion herein. The court, however, had no trouble disposing the contentions of the subsequent locator as follows:

> "There is no statute, law, rule, or regulation which prevents locators of mining claims from relocating their own claim, *and including additional vacant ground unclaimed by other parties, under a different name, and conveying it by the designation of the last name.*" (Emphasis supplied.)

A fortiori, such an inclusion of additional land could be made without a change of name, whether the new location be considered an amendment or a relocation.

Pelican & Dives Min. Co. v. *Snodgrass,* 12 Pac. 206, is not comparable with the instant case since the person claiming prior rights had made no location of a mining claim at all but had merely driven a tunnel. Four years later, *after intervening locators had located the ground,* he returned to the area and attempted to post a notice and erect corner monuments in conflict with the intervening claim.

Appellant quotes at some length from *Snyder, Mines and Mining* to the effect that some decisions sanction the moving of boundary stakes during the period permitted for the performance of discovery work, notwithstanding the intervention of subsequent locators. This matter has no relation to the amendment or relocation of a mining claim to include vacant and unappropriated lands such as is involved herein; and the quoted material in fact implies that the locator could certainly move his boundary stakes in the absence of intervening locators.

The case of *Cranford, et al.* v. *Gibbs, et al.*, 123 Utah 447, 260 P. 2d 870, while not in point on the facts, fully supports the position of respondent on this appeal. The case does not hold that a locator with notice may rely on a recorded Notice of Location but, to the contrary, holds that where there is a discrepancy between the Notice of Location and the claim on the ground, the actual lines of the claim on the ground control. Both the *Cranford* case and the section in *Morrison's Mining Rights* referred to recite the general rule that notices of location are to be accorded a liberal not a technical construction and that any language which will be general notice to subsequent prospectors will make a sufficient description. In the instant case, of course, appellant had full and complete notice of the claim of respondent.

The case of *Meydenbauer* v. *Stevens*, 78 Fed. 787, cited by appellant to sustain the proposition that the recorded notice and the location on the ground must correspond, actually holds as follows:

1. The statute authorizing the location of mining claims on the public domain does not require the posting or recordation of a notice of location.

2. If a notice is recorded which does not accord with the location of the claim on the ground, the location on the ground will prevail and will determine the locus of the claim.

3. Where a prior locator is in actual possession of the ground in dispute and the subsequent locator violates such possession without color of right or

> title, the prior locator is entitled to prevail although his location was defective.

The Court will note that this case fully sustains the contentions of respondent and, in fact, cites as controlling *Haws* v. *Victoria Copper Mining Co.,* 160 U. S. 303, cited hereinafter.

In *Hauswirth* v. *Butcher,* 1 Pac. 714, the only issue was whether the locator could locate a claim 2,000 feet long instead of the maximum of 1,500 feet permitted by statute.

In *Newbill* v. *Thurston,* 4 Pac. 409, the court ruled in favor of a subsequent locator where the prior locator had not segregated his claim by erecting corner monuments until after the acquisition of rights by intervening parties. In the instant case, of course, respondent's monuments were in place in their present position three years prior to appellant's first attempt to locate the Poison Fraction. It is also noted that the case of *Doe* v. *Waterloo Min. Co.,* 70 Fed. 455, next cited by appellant, was a retrial of the *Newbill* case in the federal courts. The U. S. Court ofAppeals for the Ninth Circuit held that the prior locators should prevail notwithstanding the failure to erect corner monuments prior to the acquisition of intervening rights, so long as said monuments were erected within a reasonable time.

The cases of *Erhardt* v. *Boaro,* 113 U. S. 527, and *Sanders* v. *Noble,* 55 Pac. 1037, likewise relate solely to the question of whether or not a party can acquire rights as against a posted notice of location prior to the time when the original locator segregated his claim on the public domain by erecting corner monuments.

The further quotations from *Cranford* v. *Gibbs, supra,* are not in conflict with the position contended for by respondent herein. The quotations clearly refer to the effect of boundary changes on intervening rights. The case holds that priority of location, that is, priority in time, cannot be maintained if an amendment amounts to a new and different location. This is clearly the law. If appellant had acquired his right to the area in dispute prior to the time when the Farmer John No. 3 was purportedly amended or relocated, respondent would not be entitled to prevail on a motion for summary judgment. It is admitted, however, that the amendment or relocation, if made at all, was made some three years prior to appellant's first attempt to initiate any rights in the disputed area.

Before closing this portion of respondent's argument, it may be well to point out that there can be no question as to the right of respondent to amend or relocate its claim so as to take in territory not originally claimed so long as there are no intervening rights to such territory. We believe this to be axiomatic. The only litigated cases on this point, and all of the cases cited by appellant in relation thereto, concern situations where a third party has located the area in dispute prior to the amendment or relocation. As said in *Lindley,* Volume 2, Third Edition, Section 396:

> "There is no statute, law, rule or regulation which prevents a locator of a mining claim from amending his location and including additional vacant ground unclaimed by other parties, or even giving to the location a different name."

See also Section 397, which discusses the matter at length.

There is, of course, no contention herein that the dis-

puted ground was not vacant public domain at the time the purported change of boundaries was made, and appellant himself attempted to initiate no rights therein until several years thereafter.

(B) Appellant Had No Standing in 1955 or 1956 to Initiate a Valid Mining Claim on the Area in Conflict.

It is well established by a long and distinguished line of authorities in virtually all the mineral bearing states that a locator, with full knowledge that a particular tract of land is claimed by another, may not enter such land for the purpose of establishing a mining claim thereon while such other person is in possession and working and mining the claim. This rule derives from and is an equitable extension of the often quoted statement that "a mining claim cannot be located in trespass" and is applied in situations where a subsequent locator attempts to reap the benefits of another's labor by resort to the technical niceties of the mining laws.

It should be noted that the rule is applied only in possessory actions between mining claimants, such as the instant case, and not in those cases where the rights of United States or those of persons claiming under nonmineral laws are involved. As was stated in *Houck* v. *Jose*, 72 F. Supp. 6, affirmed 171 F. 2d 211:

> "No presumptions are indulged in favor of a claimant, even in possession, against the United States, but as between a locator in possession, and a subsequent intruding locator, the law favors the

> locator who in good faith, occupies mineral lands and does improvements on them against the intruder who goes on the land which he knows has been located, claimed and occupied and tries to oust him. (Citing numerous cases.)"

In the case of *M'Intosh* v. *Price,* 121 Fed. 716, the original locator had located a claim larger than was permitted by law. The court, conceding that the claim was invalid and void as to the excess, nevertheless held that a junior locator could not enter upon the possession of the prior locator to claim the excess. In so holding, the court stated:

> "The policy of the mining laws of the United States does not permit a locator to thrust out of the possession of his discovery and the pay streak of his claim one who has located a placer claim in attempted compliance with the mining rules and laws, and who is actually engaged in mining upon that portion of his claim. A case directly decisive of the question in *Haws* v. *Victoria Copper Mining Co.,* 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436. In that case the Victoria Mining Company was in possession of and was engaged in working certain mining claims. One of its employees, discovering what he conceived to be fatal defects in the location notices of the claims, conceived the secret intention of taking possession of the property for his own benefit, secured the assistance of another, and made locations on the ground then occupied by his employer, set stakes and posted notices, and in the night time ousted the mining company from its possession. The court held that such an intruder and trespasser could not make his wrongdoing successful by asserting a flaw in the title of him against whom the wrong had been committed. In *Eilers* v. *Boatman and Others,* 111 U. S. 357, 4 Sup. Ct. 432, 28 L. Ed.

> 454, the Supreme Court, affirming the decision of the territorial court of Utah in *Eilers* v. *Boatman*, 3 Utah 167, 2 Pac. 66, held that one cannot locate ground on which another is in the actual possession under claim and color of right, because such ground is not vacant and unoccupied."

In the *Eilers* case referred to, the Supreme Court of Utah said:

> "It is conceded by the respondents, and is doubtless true, that, as between two locators, and as affecting their rights only, one cannot locate ground of which the other is in actual possession under claim or color of right, because such ground would not be vacant and unoccupied."

The contention of the subsequent locator in the *Eilers* case was that the prior locator had not properly staked his claim so as to segregate the same from the public domain.

In *Gerber* v. *Wheeler*, 115 P. 2d 100, (Idaho), without even discussing the claimed defects in the prior location, the court, after noting that the subsequent locator had actual knowledge of the boundaries of the prior claim, said:

> "We recently passed upon a somewhat similar question in the case of *Independence Placer M. Co.* v. *Hellman*, 62 Idaho . . ., 109 P. 2d 1038, 1042, and said: 'One who has actual notice, that a prior locator is claiming a tract of mining ground and has done location work thereon and continued to do prospecting and assessment work on the property, is not in a position to make a valid location on such property. In such case he has notice that the ground is claimed by another and that so much of it as is claimed and occupied is no longer public domain

> subject to location; and he may not question the sufficiency of the original location or the character of the original occupant's title.' [Citing cases.]"

In the case of *Brown* v. *Murphy*, 97 P. 2d 281 (California), the subsequent locator claimed, among other things, that there was no proper evidence as to the location of any of the prior claims and that there was no evidence that the prior claims were staked and marked so that the boundaries could be readily traced. The court said:

> "The undisputed findings of the court in the instant case are that the respondent was in the actual possession and occupancy of the property after the discovery of mineral thereon. When the appellant, in bad faith, with full knowledge of these facts, and without any right or color of title, ousted the respondent, *and although if it may be conceded, which we do not, that the location under which respondent was in possession was invalid or defective,* still he was in actual possession after discovery, which is essential to perfect any mineral location, and which was the only discovery made under any location. The land was not open and unoccupied mineral land which warranted the appellant in the face of such knowledge of respondent's actual possession to invade such possession, oust respondent therefrom, and under such entry attempt to negotiate a location of the property. On the contrary, an intrusion under such circumstances by appellant, not in good faith, constituted him a naked trespasser who is in no position to raise any issue whatever on the question of title under which respondent held his possession of the property."

In *Ehrhart* v. *Bowling*, 97 P. 2d 1010 (California), the contention was that the prior locator had not adequately

marked his claim upon the ground. The court, after noting that the subsequent locators had often passed the prior claims and were well acquainted with them, said:

> "Having this actual knowledge, they could not attack the location on technical grounds. It is well settled that one who has actual knowledge of the claims of another to mineral lands cannot, in good faith, relocate the ground because of technical defects in the making of the location [citing numerous cases]."

The same rule was applied, in spite of various claimed defects in prior locations, in *Pease* v. *Johnson,* 235 P. 2d 229 (California), *Little Sespe Consol. Oil Co.* v. *Bacigalupi,* 139 Pac. 802 (California), *Hayden Hill Consol. Mining Co.* v. *Lincoln Mining Co.,* 160 P. 2d 468 (Idaho), *Steele* v. *Preble,* 77 P. 2d 418 (Oregon), *Scoggin* v. *Miller,* 189 P. 2d 677 (Wyoming), *Ninemire* v. *Nelson,* 249 Pac. 990 (Washington).

The Supreme Court of Utah has recently had occasion to pass on a closely analogous question in *Fuller* v. *Mountain Sculpture,* 6 Utah 2d 385, 314 P. 2d 842, in which case the subsequent locator alleged certain defects in the location notice and in the marking of the claim upon the ground. The court said:

> "It is further to be observed that the defendants, * * * had actual notice that plaintiff claimed the area in dispute. Therefore, even if there had been deficiencies of a technical nature in plaintiff's location, that furnishes no succor to defendants * * * in attempting to establish their claim. It is well settled that minor defects in the notices, de-

> scriptions, or procedure will not defeat the location of a prior claimant at the instance of one having actual notice."

In support of the last statement, the court cited, with approval, *Steele* v. *Preble, supra* and *Independence Placer Mining Co.* v. *Hellman,* 109 P. 2d 1038. Portions of the opinion in the *Hellman* case are contained above in the quotation from the decision in *Gerber* v. *Wheeler, supra.*

There can be no doubt in this case that appellant was fully apprised of respondent's claim and that respondent was in possession of the claim and mining therefrom when appellant attempted to initiate a claim thereon. Under the authorities cited, he was therefore not in good faith and his acts were those of a trespasser.

(C) Respondent Has Established a Valid Title to the Farmer John No. 3 Claim as Against Appellant by Reason of the Fact That it and its Predecessors in Interest Have Held and Worked Said Claim for a Period in Excess of Seven Years.

Under the mining laws of the United States, a claim to mineral lands on the public domain may be established by location and segregation of a portion thereof, as outlined in the preceding arguments, or such a claim may be established by holding and working a particular mining claim for a period equal to the statute of limitations for mining

claims of the state in which the claim is situated. Section 38 of Title 30, U. S. C., provides as follows:

> "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under sections 21-24, 26-30, 33-48, 50-52, 71-76 of this title, in the absence of any adverse claim; * * *."

Some courts at an early date construed this statute to be operative only in the absence of a claim by a third party, but the Supreme Court of the United States, the final arbiter in such matters, has held that if a claim is so held and worked the locator's right to a patent is complete and is the equivalent of a valid location. In the case of *Cole* v. *Ralph*, 252 U. S. 286, the Supreme Court said:

> "The only real divergence of the opinion respecting the section [30 U. S. C. 38] has been as to whether it is available in an adverse suit, such as these are, or is addressed merely to the land department. Some of the courts have held it available only in proceedings in the department * * * and courts in greater number have held in available in adverse suits * * * The latter view has received the approval of this court."

In the instant case, the Farmer John No. 3 claim was located in 1943, twelve years prior to appellant's first attempt to initiate a claim in the area. Moreover, there is no contention herein that respondent has not performed the

assessment work required by federal law to hold a mining claim or has not otherwise "held and worked" the claim continuously since 1943. In fact, appellant himself estimates that $300,000.00 has been expended in the development of the claim.

It is true that respondent is conceding, for the purposes of the motion for summary judgment and this appeal, that the boundaries of the claim were changed sometime prior to 1952. Since this is so, it could be argued that respondent may not have held and worked the same ground for the statutory period. While we have found no cases exactly in point, respondent contends that the statute, which is remedial in character and designed to protect those who in good faith develop mineral lands belonging to the United States, was intended to lay at rest all matters relating to the original location of a particular claim after the required period of time had elapsed. In other words, respondent contends that plaintiff at this date is precluded by the statute from raising any question as to the original location af the claim and, in addition, is precluded from raising any question as to the movement of the boundaries thereof, *at least in the absence of a showing on his part that his rights attached to a particular portion of the ground prior to the movement of the boundaries.* The undisputed fact in this case is that appellant's rights did not so attach.

If a litigant in appellant's position were entitled to question the efficacy of an original location or the exact area covered thereby after the period of limitation had expired, the purpose of the statute would be thwarted and

the benefits intended to be bestowed thereby on those who hold and work mineral bearing lands would be illusory.

Moreover, the law is well settled in this state that, in considering whether or not to apply the particular statute in question to a given case, the court may consider all the facts and circumstances surrounding the case and the equities reflected thereby. *Springer* v. *Southern Pac. Co.*, 67 Utah 590, 248 Pac. 819. In that case, though conceding the lack of a lode discovery by the prior locator, the court said:

> "We cannot conceive of a more flagrant disregard of the rights of one who for nearly a quarter of a century has been in the actual, open, visible and exclusive possession of mining claim, one who has expended thereon many hundreds of thousands of dollars, one who has in every respect but one complied with the mining laws * * * than is made to appear in this case. Moreover, it is palpably clear that the appellants [the subsequent locators] have not entered upon the mineral lands in question for the purpose of in good faith developing the mineral contained therein, but have done so for the sole purpose of dispossessing the respondent and to compel it to pay tribute to appellants * * *.
>
> "As a matter of course, the appellants contended that the purpose they have in view and the vast expenditure of money made by the respondent, are wholly immaterial to this controversy. While so far as respondent's technical rights in the mineral lands are concerned that may be the proper view to take, yet, when the question of the application of a remedial statute is to be considered, we think all of the facts and circumstances to which reference has been made are material and should be given proper consideration."

In this case, respondent and its predecessors in interest have occupied and worked the subject claim for a period in excess of fifteen years, have expended vast sums of money thereon, and have in good faith developed and utilized the mineral rock contained therein. Respondent submits that the language of this court quoted above is applicable to the positions of the parties in the instant case and that a court of equity should apply the statute referred to and sustain defendant's title on that basis.

In Point II of his brief filed in this case, appellant argues that no sufficient showing has been made to establish respondent's claim by adverse possession. In addition to arguing facts already admitted, appellant makes only the single point that respondent has not held and worked the particular area now covered by the Farmer John No. 3 for seven years. As indicated above, if this issue may now be raised by appellant, respondent must concede that, under the admissions made for the purpose of the motion for summary judgment, the argument in this subheading must fail. There are, however, no disputed questions of fact implicit in the argument as made by respondent herein.

The cases cited by appellant under Point II of its brief do not purport to decide the question which is posed in this argument. In the case of *Belk* v. *Meagher,* 104 U. S. 279, the plaintiff located his claim only a few months prior to the time defendant located an adverse claim. Moreover, plaintiff did not remain in possession and performed only token work on the claim.

The case of *Malone* v. *Jackson,* 137 Fed. 878, is in all respects similar to the *Meagher* case. The prior locator

located only a short time before the subsequent locator and did not retain possession.

The case of *California Dolomite Company* v. *Standridge,* 275 P. 2d 823, does hold, as contended by appellant, that a subsequent locator may make an issue of fact out of whether the prior claim was properly located at the outset and whether said claim has been "held and worked" for the proper period of time. While the decision is undoubtedly correct with respect to the issue of "holding and working," respondent submits that it is against the weight of authority with respect to the issues on the original location. This Court in fact, in the case of *Springer* v. *Southern Pac. Co., supra,* has even refused to consider whether or not a proper discovery was made after the passage of the period of limitations.

CONCLUSION

For the purposes of the motion for summary judgment below and hence on this appeal, respondent has conceded every material fact contended for by appellant and has shown that appellant cannot recover as a matter of law. Appellant's claim to the disputed area, while devoid of any legal merit, has been and continues to be damaging to respondent company and has impaired the development of the mine on the Farmer John No. 3 claim. Respondent submits that it would be inequitable, in view of the overwhelming weight of authority on the legal propositions discussed herein, to require Respondent to submit to the expense and further delay which would be occasioned by a trial of this case insofar as the same relates to the Farmer John No. 3 claim.

The judgment of the court below should be affirmed.

Respectfully submitted,

VAN COTT, BAGLEY,
CORNWALL & McCARTHY,
CLIFFORD L. ASHTON,
DONALD E. SCHWINN,

Attorneys for
Defendant and Respondent.

Suite 300, 65 South Main Street,
Salt Lake City, Utah.